United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4049, 61, 74

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P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ITT WORLD COMMUNICATIONS INC., RCA GLOBAL COMMUNICATIONS, INC., and WESTERN UNION INTERNATIONAL, INC.,

Petitioners,

—against—

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

—and—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, XEROX CORPORATION, AMERICAN PETROLEUM INSTITUTE and HAWAIIAN TELEPHONE COMPANY,

Intervenors.

PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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P/S

BRIEF OF PETITIONER WESTERN UNION INTERNATIONAL, INC.

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TABLE OF CONTENTS

I. Cases

II. Statutes

III. Other Authorities

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ITT World Communications Inc., RCA Global Communications, Inc., and Western Union International, Inc.,

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—and—

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BRIEF OF PETITIONER WESTERN UNION INTERNATIONAL, INC.

Introduction

These consolidated proceedings involve issues of fundamental importance to the international telecommunications industry.

This brief is submitted on behalf of Western Union International, Inc. ("WUI") in support of the petitions for review filed by WUI, ITT World Communications Inc. ("ITT Worldcom") and RCA Global Communications, Inc. ("RCA Globcom") which ask this Court to set aside the Report and Order released by the Federal Communications Commission ("FCC") on January 19, 1976 (hereafter referred to as "the Order"). (JA 1-9).* Petitioners are international record carriers ("IRCs") engaged for the most part in the business of transmitting "record," that is, written or non-voice, communications internationally. In addition, petitioners offer leased private line services by which users may alternate at will between voice and record communications between specific points.

Petitioners' chief opponent before the FCC was American Telephone and Telegraph Company ("AT&T"). AT&T owns and operates a monopoly long-lines communications network within the continental United States connecting 23 regional wholly-owned or controlled companies, each of which dominates communications within its respective region and all of which collectively serve 80% of all telephones in the continental United States.** Additionally, AT&T owns and operates a monopoly long lines interna-

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* The FCC Order is reported at 57 F.C.C.2d 705 (1976). The citations "JA" and "PA" are to the Joint Appendix and the Addendum to Petitioners' Briefs, respectively.

** *American Telephone and Telegraph Co.*, 38 F.C.C. 2d 213, 217-18 (1972). *See also* American Telephone and Telegraph Co. Prospectus filed June 16, 1976 with the Securities Exchange Commission.

tional network from the continental United States to international points which interconnects with its domestic network.

The Order under review stems from a proceeding initiated by the FCC pursuant to a Notice of Inquiry released on July 31, 1972 which requested comments from carriers and interested parties regarding future FCC policies "governing the provision of overseas dataphone-type services." (JA 10-16).* By "dataphone-type services," the FCC was referring to communication services whereby subscribers may use a telephone, coupled with transmittal equipment such as a facsimile or teletypewriter machine, to send data, facsimile or other record communications, and to have the capability of interspersing such "record" communications with voice communications. "Dataphone" is an AT&T service mark designating its domestic offering of switched alternate voice/data ("AVD") service.**

Within the continental United States, AT&T and its affiliated companies have offered switched AVD services since 1958. To date, the FCC has not authorized anyone to offer such services internationally, with two exceptions: (i) certain of the IRCs, and AT&T in conjunction with its correspondent Hawaiian Telephone Company ("Hawaiian Telephone"), have been authorized to offer switched AVD

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* *The Notice of Inquiry (Inquiry Into Policy To Be Followed in Future Authorization of Overseas Dataphone Service)* is reported at 36 F.C.C.2d 605 (1972).

** A "switched" telecommunications service is one in which any subscriber may communicate at will with any other subscriber on the network, as opposed to a "leased line" service in which a customer is able to communicate only with another fixed point. AT&T's domestic MTS (message telecommunications service) and the IRCs' international Telex systems are examples of "switched" telecommunications services.

services between the continental United States and Hawaii* and (ii) the FCC has authorized the IRC's since 1964 to offer their "Datel" services between the continental United States and other international points.

Differences between AT&T's domestic Dataphone service and the IRCs' international Datel services.

Datel, provided internationally by the IRCs, and Dataphone, provided domestically by AT&T, involve precisely the same technology. Datel thus far has differed from and has been inferior to Dataphone, however, in two critical respects, both stemming from artificial limitations created by the FCC and AT&T.

First, the international Datel user, unlike the domestic Dataphone user, has not been permitted to use voice and data interchangeably; voice communications have been permitted *only* to the extent necessary to initiate and coordinate data transmissions. This restriction on the use of voice, sometimes referred to in the industry as voice for "cue and contact control," arbitrarily has limited the sender and receiver of data transmissions to the most rudimentary of oral exchanges pertinent to their data transmissions. For example:

Sender: "Are you ready to receive data?"
Receiver: "Go ahead."
Sender: (after sending data)
"Have you received the data?"
Receiver: "Yes."

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* For Communications Act purposes, Hawaii is deemed to be an "international" point, 47 U.S.C. §222(a)(10), but as discussed *infra* at pp. 21-24, Hawaii has been treated specially.

No substantive discussion regarding the content of the data (or any other subject) may be held pursuant to the existing tariff restrictions on Datel services. Dataphone users, in contrast, have had no restrictions on their ability to use voice to explain or comment on data transmissions, thereby making for a more flexible and useful service.

The FCC's restriction on the use of voice in the IRCs' Datel services has prevented Datel from achieving the wide acceptance internationally which AT&T's Dataphone service has achieved domestically.

Second, while both Datel and Dataphone services are available to subscribers of AT&T's domestic MTS network, it is at present far more convenient and less time-consuming to place a Dataphone call than a Datel call. A customer wishing to transmit data internationally by use of Datel must dial an IRC (either a 7 or 10 digit call), obtain the assistance of the IRC operator to reach the overseas destination and then wait until the two calls are "patched through." This cumbersome and time-consuming manual transmission system is the result of AT&T's refusal to permit the IRCs to interconnect their systems with AT&T's domestic MTS network system. Moreover, the fragmented linkage required to achieve the desired connection increases the impairment of the data transmission.* In contrast, Dataphone customers need only dial the telephone number at the destination area in precisely the same manner as for an ordinary telephone call, without any operator having to intervene. The difference constitutes a preference by AT&T of its own customers which the FCC has tolerated and countenanced despite some 10 years of effort by the IRCs to achieve equal status.

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* *See* discussion *infra* at pp. 11-13, 37-40.

This difficulty of access and transmission resulting from inadequate interconnection is the other key reason why Datel has not found wide public acceptance.

With adequate and nondiscriminatory interconnection arrangements and the ability to use voice and data interchangeably, the IRCs' Datel services would readily satisfy the growing public demand for full overseas switched AVD services. The FCC, however, has been slow to order interconnections or grant voice. Instead, reversing long-standing policy, the FCC seems to be willing to permit AT&T to extend its monopoly position to include overseas data communication services which, but for the artificial constraints noted above, would be adequately and fully supplied by the IRCs. This expansion by AT&T threatens the very viability of the IRCs. For example, the Order would allow AT&T's subscribers to attach a teletypewriter machine (used to transmit telex messages) to their telephones thereby eliminating the public demand for international telex service which has been and is the "bread and butter" service of the IRCs. In addition, by again deferring the perennial controversy on interconnection, the FCC Order allows AT&T to achieve an inequitable head start over the IRCs in the new overseas switched AVD market.

We develop these points below and show that the FCC Order is without support in the record and is arbitrary, capricious, and inconsistent with the procedures required by law. The Order should be set aside and the issues remanded for appropriate further proceedings.

A statement of the issues and a detailed statement of the case, including the relevant background information on the development of the communications industry and the nature of the services provided by AT&T and the IRCs, is contained in the brief being submitted by RCA Globcom. In the interest of avoiding repetition, we therefore turn

directly to a discussion of the FCC Order, the related events which have occurred since the Order, and the reasons why we believe the Order must be reversed.

The FCC Order

On July 14, 1972, WUI submitted an application for authority, pursuant to Section 214 of the Communications Act, 47 U.S.C. §214, to provide the equivalent of Dataphone service to all overseas points. (JA 13). The FCC returned the application as unacceptable because, among other reasons, it did "not believe the processing of individual applications would be a satisfactory method of arriving at policy determinations in this matter." (JA 13). Contemporaneously, the FCC issued a Notice of Inquiry requesting comments from carriers and interested parties regarding the need for the development of more extensive overseas AVD services; and, if such need exists, whether the IRCs or AT&T, or both the IRCs and AT&T, should be authorized to provide such services. (JA 10-16). The parties to this proceeding, and several other companies, submitted comments in the nature of pleadings. Thereafter, some 3½ years later, without any further inquiries or proceedings or any fleshing out of the vague generalities and conflicting contentions making up the pleadings, the FCC issued the Order which is now under review.

The FCC found a significant, growing demand for switched AVD services in overseas communications (JA 2-3). The FCC stated that AT&T should be permitted "to add dataphone-type services to the categories of service for which it may use its overseas facilities" (JA 7) and that the IRCs should be permitted "to expand their switched

record services, such as Datel, and to interconnect their facilities with AT&T's domestic MTS network." (JA 7). Accordingly, the Chief of the FCC's Common Carrier Bureau was directed to accept applications from both AT&T and the IRCs. (JA 9).*

The FCC's Order gave three reasons to justify its decision to allow AT&T to offer Dataphone internationally. None of these reasons is supported by the record or satisfies the governing standards by which such an administrative decision should be made.

First, the FCC ruled that "there are substantial differences between the dataphone-type services proposed by AT&T and those services proposed by the IRCs." (JA 4). The IRCs contend that the services are the same, and that the record shows them to be the same.

Second, the FCC accepted AT&T's assertion that it can extend its domestic Dataphone service overseas without incurring additional cost, while finding that the IRCs would have to incur additional and substantial capital costs for the "specialized dataphone-type" services which they purportedly seek to offer. (JA 5). The FCC disregarded the fact that only one of the IRCs, RCA Globcom, proposed higher quality services (those the FCC called "specialized"), and that all of the IRCs, including RCA Globcom, sought to offer the very same "basic" services as AT&T, and at the same rates. (JA 92-93, 99, 123, 179, 189, 231, 234, 245). The FCC also ignored the IRCs' contention that although AT&T might be able to make an initial offering of Dataphone with-

* As we develop later, the right given to the IRCs to file such applications was illusory because of the FCC's failure to deal with the IRCs' requests for interconnection.

out additional cost, it could not continue to offer an acceptable service without spending a great deal of money to upgrade and maintain its facilities. (JA 339).

Third, the FCC concluded that AT&T's entry into the overseas dataphone market would serve "an unmet need by giving added flexibility to the customer to use the international switched telephone system for both voice and data." (JA 6). The FCC thereby ignored that AT&T itself was responsible for the "unmet need" by its adamant resistence to non-discriminatory interconnections between its domestic MTS network and the IRCs' Datel services. In addition, the FCC did not address itself to removing the present restrictions on the use of voice in connection with the IRCs' Datel services generally, as had been done with respect to communications between Hawaii and the Mainland. *See ITT World Communications Inc.,* 2 F.C.C. 2d 573 (1966) and discussion *infra* at pp. 21-24).

There are two additional reasons which mandate a reversal.

1. The FCC is required to evaluate the anticompetitive effects of its decisions. It failed adequately to do so or to give consideration to alternatives having less anticompetitive effects. Heretofore, established FCC policy, reflected in the *TAT-4 Decision*• and other important precedents, precluded AT&T, because of its dominance in world-wide communications, from entry into new fields of communications which could be serviced adequately by other carriers. The FCC in its present Order paid lip-service to, but disregarded, its holding in *TAT-4.* The FCC acknowledged that allowing AT&T to offer Dataphone internationally would

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• *Matter of American Telephone and Telegraph Co.,* 37 F.C.C. 1151 (1964), discussed *infra* pp. 19-20.

cause the IRCs to "suffer some losses" but, unlike *TAT-4,* concluded that this would not affect the viability of the IRCs. (JA 7). Even if the adverse consequences to the IRCs would be very severe, the FCC added, it would not set up a "protective umbrella" to shield the IRCs. (JA 8). Thus, *TAT-4* was turned on its head; AT&T now was permitted to enter the international data business regardless of the economic and anticompetitive consequences.

2. The FCC Order carved out of the proceeding and left undecided the critical question of interconnection. For more than a decade the IRCs have petitioned the FCC to achieve adequate interconnection so that Datel could effectively serve the public. But AT&T strenuously resisted, and the FCC has failed to come to grips with the issue.* The FCC Order once again deferred to AT&T. Despite the fact that the comments submitted by the IRCs pursuant to the 1972 Notice of Inquiry complied with an identical earlier request, the FCC Order again called for "pleadings from the international carriers regarding what facilities and interconnections, not presently provided, are necessary for their proposed services" (JA 8), and promised "[u]pon

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* *See, e.g., American Telephone and Telegraph Co.,* 38 F.C.C. 1315, 1391-20 (1965):

> "We shall accordingly defer action on all aspects of this request including interconnection with the facilities of AT&T until all the data and information relevant thereto have been filed and evaluated."

See also the application filed by WUI on June 13, 1965, and the reply comments and letter filed by AT&T on June 21, 1965 and January 6, 1966, respectively, in FCC File No. T-C-1896; Transcript, *June 17, 1971 Conference on Transatlantic Communications* 31-34 (FCC Docket No. 18875). (JA 409-29; PA 75-102).

receiving these filings, [to] issue any appropriate orders." (JA 9).

Thus, the refusal of AT&T to provide the IRCs with interconnection and not any inherent weakness in IRC capability, was the cause of the public's "unmet need." This "unmet need" was then assigned as the reason for authorizing AT&T to enter the international market for switched AVD transmissions.

Subsequent Proceedings Relevant to the Petitions for Review

Pursuant to the FCC Order, AT&T filed for authority, pursuant to Section 214 of the Communications Act, 47 U.S.C. §214, to offer Dataphone internationally over its MTS network. (PA 105-14). The IRCs, however, are unable to file competing applications due to AT&T's continuing refusal to permit interconnection and the FCC's continuing unwillingness to order interconnection.

In an effort sensibly and reasonably to discuss the subject of interconnection, the IRCs met with AT&T following the FCC Order. When those discussions failed to elicit any cooperation from AT&T, the supplemental pleadings requested by the FCC Order were submitted. (PA 1-62).*

Basically, the pleadings submitted by the IRCs asked the FCC to take a more active role in resolving the interconnection dilemma. Alternatively, ITT Worldcom urged that the FCC hold an interconnection hearing pursuant to Section 201 of the Communications Act, 47 U.S.C. §201. (PA 10). The pleadings submitted by the IRCs requested treatment, not as telephone subscribers, but as common carriers so

* In addition to the petitioners herein, a pleading also was submitted by another IRC, TRT Telecommunications Corporation.

that a customer would have the same access to the IRCs for Datel as he has to AT&T's Long Lines Department for Dataphone. (PA 2, 16, 20, 43, 51, 53). The IRCs urged that if a customer, in order to route a message through their facilities, has to punch or dial numerous digits additional to that which he has to punch or dial in routing a message through AT&T's facilities, he will naturally prefer to dial AT&T and the IRCs will not be competitive. (PA 3, 17, 22, 43, 56). The IRCs stressed, as well, that they are entitled to four-wire trunk interconnections of the kind existing between AT&T's Long Lines Department and AT&T's domestic MTS network because the present two-wire modes are simply incapable of assuring the dependable high-quality transmission necessary for data communications. (PA 2, 21-22, 57).*

Finally, in their interconnection comments and their subsequent petitions to deny, the IRCs asked the FCC to defer consideration of AT&T's §214 application pending a resolution of the interconnection dispute so that AT&T would be unable to take advantage of the dispute and thereby obtain an invaluable headstart in the competition to provide service for the overseas switched AVD market. (PA 9, 19-20, 28, 45, 55, 61, 115-191).

AT&T's reply pleading on interconnection contended that the FCC Order granted it a monopoly in "basic dataphone" free from competition by the IRCs. The IRCs, according to AT&T's reading of the FCC Order, were lim-

* Each time there is a conversion in the through transmission facility from two-wire to four-wire lines, the efficiency and clarity of the transmission is adversely affected. Simply put, there are more such conversions in a Datel call via an IRC than a Dataphone call via AT&T. This inequity can be readily cured by the establishment of a four-wire trunk interconnection (instead of the present two-wire subscriber line) between the MTS and the IRCs' Datel service centers.

ited to providing "specialized dataphone-type" services which, according to AT&T, do not require either the non-discriminatory interconnections nor the lifting of the artificial voice restriction. (PA 63-70). The IRCs' requests for interconnection, AT&T claimed, "go far beyond what the Commission had in mind." (PA 68).

AT&T thus interpreted the FCC Order as dividing the overseas voice/data market into two segments: one, denominated "basic dataphone-type" service, was to be reserved for AT&T alone; a second, denominated "specialized" was to be the domain of the IRCs. Since, according to AT&T, the IRCs were to be confined to "specialized dataphone-type" services, they had no need for the type of non-discriminatory interconnection they sought. (PA 63-70).

The FCC staff, recognizing that these disparate views were the product of "misunderstandings as to the intent of the [FCC] Order," called a meeting of the parties for June 22, 1976. (PA 103-04). The meeting failed to clarify the misunderstanding. The IRCs and AT&T repeated their positions, and the two FCC staff members simply told the parties to be more flexible.*

Thus, it appears that the FCC is content to defer the issue of interconnection (which should be resolved no matter what the FCC intended its Order to mean) and to permit the unsatisfactory status quo to continue.

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* A synopsis of the meeting is reported in *Telecommunications Reports*, vol. 42, no. 26, p. 27 (June 28, 1976).

Reasons for Reversal

The justifications given by the FCC for its departure from its prior precedents and established policy are not supported by the record. The FCC acted arbitrarily in permitting AT&T to enter the switched AVD overseas market, in failing adequately to consider the antitrust consequence of such entry and in suggesting arbitrary divisions of such market which have opened the door for AT&T's contention that it should provide the "basic services" free from competition with the IRCs. The FCC also acted arbitrarily in again deferring resolution of the issue of interconnection notwithstanding 10 years of effort by the IRCs to obtain such resolution. Finally, the FCC acted arbitrarily in deciding these questions on unfounded assumptions and in resolving sharply disputed contentions without obtaining adequate available information or holding some form of hearing or fact-finding proceedings that could materially have aided it in making a well-reasoned decision. In sum, we submit, and by the discussion following we show, that the FCC accepted the contentions of AT&T uncritically, and without the independent analysis and adequate reasoning required of an administrative agency.

ARGUMENT

POINT I

THE FCC FAILED TO ADEQUATELY ENUNCIATE THE BASIS FOR ITS DECISION AND FAILED TO RATIONALLY DISTINGUISH ITS PRIOR PRECEDENTS.

It is a basic principle of administrative law that an administrative agency must enunciate the reasons for its decisions and that those reasons must be adequately supported by the record. *Public Service Commission* v. *FPC*, 436 F.2d 904, 907 (D.C. Cir. 1970) (holding that an agency cannot "take refuge in its alleged expertise" and must "set forth convincing reasons for its determination in sufficient detail to allow the validity of these reasons to be critically examined" by the parties adversely affected and the reviewing courts); *Northeast Airlines, Inc.* v. *CAB*, 331 F.2d 579, 588-89 (1st Cir. 1964) (holding that the reasons given for an agency finding were "irrelevant or inadequately developed"). An agency's reasons must be expressed with sufficient clarity to assure that the agency has "really taken a 'hard look' at the salient problems," and has "genuinely engaged in reasoned decision-making." *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). As the Supreme Court stated somewhat differently but to the same effect, a reviewing court is "powerless to affirm" an administrative determination upon grounds other than those invoked by the agency. Thus, if a reviewing court finds the grounds relied upon by the agency "inadequate or improper," reversal must follow. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196-97 (1947).

Of course, an administrative agency is not eternally bound to follow its prior precedents. When, however, it finds its earlier rulings distinguishable or warranting reversal, it must adequately explain its action; otherwise, its decision must be set aside. *Columbia Broadcasting System, Inc.* v. *FCC,* 454 F.2d 1018 (D.C. Cir. 1971) is illustrative of the basic principle. In that case, the Court criticized the FCC for not squarely confronting a prior precedent and for not adequately explaining how it reconciled its present decision with that precedent. In reversing, the Court held that a mere enumeration of factual differences did not suffice to satisfy the requirement of reasoned decision-making.

> "[A]s this court emphasized, the Commission 'must explain its reasons and do more than enumerate factual differences, if any, between * * * [similar] cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act.'" 454 F.2d at 1026, quoting *Melody Music, Inc.* v. *FCC,* 345 F.2d 730, 733 (D.C. Cir. 1965).
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> ". . . Faced with two facially conflicting decisions, the Commission was duty bound to justify their coexistence. The Commission's utter failure to come to grips with this problem constitutes an inexcusable departure from the essential requirement of reasoned decision making." 454 F.2d at 1027.

In *Atchison, Topeka & Santa Fe Railway* v. *Wichita Board of Trade,* 412 U.S. 800 (1973), the Supreme Court determined that when an administrative agency re-examined or reinterpreted precedent, a clear indication of the policy prompting the re-examination or reinterpretation was required.

> ". . . Although the Commission must be given some leeway to re-examine and reinterpret its prior holdings, it is not sufficiently clear from its opinion that it has done so in this case. A reviewing court must be able to discern in the Commission's actions the policy it is now pursuing, so that it may complete the task of judicial review . . . ." 412 U.S. at 805-06.

Also, see Secretary of Agriculture v. *United States,* 347 U.S. 645, 654 (1954); *Garrett* v. *FCC,* 513 F.2d 1056, 1060-61 (D.C. Cir. 1975); *FTC* v. *Crowther,* 430 F.2d 510, 514 (D.C. Cir. 1970).

Additionally, under Section 4(b) of the Administrative Procedure Act, 5 U.S.C. §553(c), an agency in any rule-making decision is required to incorporate a "concise general statement" of the rule's "basis and purpose." The rationale for the "basis and purpose" statement requirement was explained in *Rodway* v. *Department of Agriculture,* 514 F.2d 809 (D.C. Cir. 1975) (Wright, J.), as follows:

> "The basis and purpose statement is not intended to be an abstract explanation addressed to imaginary complaints. Rather, its purpose is, at least in part, to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." 514 F.2d at 817.

The "basis and purpose" statement must be sufficiently detailed and informative so that a reviewing court will be able to satisfy itself that the rules adopted by the agency are not arbitrary or capricious. *Amoco Oil Co.* v. *EPA,* 501 F.2d 722, 739 (D.C. Cir. 1974) (Wright, J.); *Natural Resources Defense Council, Inc.* v. *SEC,* 389 F.Supp. 689 (D.D.C. 1974).

The importance of a meaningful "basis and purpose" statement, as this Court recently indicated in *National Nutritional Foods Ass'n* v. *Weinberger,* 512 F.2d 688 (2d Cir. 1975), *cert. denied,* 96 S.Ct. 44 (1976), becomes even greater where, as here, there is an "absence of a detailed record."

> "[E]ven under the 'arbitrary, capricious' standard agency action will not be upheld where inadequacy of explanation flusters review (citations omitted). Indeed the very absence of a detailed record of the type that would be made if an evidentiary hearing were held makes it advisable for the agency, in view thereof, to provide a thorough and comprehensible statement of the reasons for its decision." 512 F.2d at 701.

The FCC did not meet these standards in the case at bar, and therefore, the Order should be set aside and remanded for further proceedings.

The FCC has long followed a policy prohibiting AT&T from offering "record" communications internationally or otherwise enlarging its monopoly.

The FCC Order for the first time held AT&T eligible to provide a new international record communications service which is equally within the capacity of the IRCs. The decision marked a sharp break with the FCC's prior decisions, particularly *TAT-4,* without any sound statement of the basis and purpose for the decision. This constitutes reversible error.

The TAT-4 Decision.

In *TAT-4,* as in the present proceeding, the FCC considered whether AT&T or the IRCs, or both AT&T and the IRCs, should be authorized to provide a form of AVD service internationally. In *TAT-4,* users of leased lines between specific points were involved. In the instant case, all persons having use of telephones with appropriate data transmission attachments are potentially involved. The FCC in *TAT-4* held that the IRCs, not AT&T, should offer AVD service on leased international lines. The FCC's reasons for denying AT&T's application in 1964 are equally applicable today.

In *TAT-4,* the FCC considered proposals of AT&T and the IRCs to jointly finance and make use of a proposed fourth undersea cable from the Atlantic Coast of the United States to Europe. The FCC authorized the construction of the new cable by AT&T with an option to the IRCs to acquire an interest in the cable. Among the matters requiring disposition was the question of who should provide the then new service of transmitting data alternately with voice on leased channels.

The FCC, relying on previous AT&T representations of its intention to stay out of the international data services market, specifically forbade AT&T from offering AVD services and confined it, in international communications, to its traditional role as a telephone carrier. Only the IRCs were authorized to develop overseas AVD leased channel services, and they made their investments in the cable in reliance on the FCC's decision to exclude AT&T.

If AT&T were allowed to enter this market, the FCC reasoned, the ability of the record carriers to obtain a fair share of the business "would be seriously jeopardized and the viability of the IRCs would be threatened" because this

new AVD service undoubtedly would displace a substantial segment of the telex and cable market. 37 F.C.C. 2d at 1158-59.

The FCC's finding that the IRCs would suffer adverse economic consequences if AT&T entered the overseas AVD market was not a product of mere conjecture; the finding was predicated, among other things, on the results of a prior decision which had allowed AT&T and the IRCs to compete for the right to provide AVD leased circuits to the United States defense agencies. AT&T received all the leases. 37 F.C.C. 2d at 1159-60. Moreover, the FCC noted that when AT&T earlier had been authorized to provide such service to the United States Air Force, that authority was granted for the sole reason that, at the time, AT&T was the only company that could provide the service. By AT&T's own concession, if any of the IRCs had been able to furnish the needed service, AT&T would have been "washed out of the case." 37 F.C.C. 2d at 1159-60.

The FCC further reasoned that since AT&T derived but 1% of its revenues from overseas service of all kinds, the loss of revenues from overseas AVD leased line services would have no discernible impact on AT&T. In contrast, the FCC analysis of the IRC's position presented a very different picture.

> "The provision of oversea telegraph services is, however, for the most part, 100 percent of the business of the international record carriers, and a significant loss in their participation in the telegraph business could have a serious effect on the viability of the international telegraph industry as a whole. This is a risk the record carriers should not be called upon to take, particularly in view of the fact that a substantial portion of this business will be diverted from existing oversea services." 37 F.C.C. 2d at 1159.

FCC Reaffirmances of TAT-4

The *TAT-4* policy of excluding AT&T from the international record communication business was reaffirmed by the FCC in 1965, 1966 and 1972 in three cases dealing with communications services to Hawaii.

In 1955, AT&T and its correspondent, Hawaiian Telephone, applied for authority to construct the first cable between the United States mainland and Hawaii, for use in non-voice, as well as voice, communications. Since Hawaii is classified by the Communications Act as an overseas point, the IRCs opposed the application fearing that a precedent might result if AT&T was authorized to transmit non-voice communications between Hawaii and the United States mainland. Construction of the cable was being urged, however, as necessary for national defense reasons and ". . . AT&T was the only carrier willing to install the cable . . . ." *RCA Global Communications, Inc.*, 37 F.C.C. 2d 1043, 1047 (1972), *rev'd on other grounds sub nom. Hawaiian Telephone Co.* v. *FCC*, 498 F. 2d 771 (D.C. Cir. 1974).* In this unique circumstance, the FCC authorized AT&T to provide "non-voice services via overseas cable facilities" because AT&T had argued that the cable could not be installed and be commercially viable without the non-voice services. *RCA Global Communications, Inc., supra* at 1047-48.

AT&T's involvement in the non-voice communications field in Hawaii was questioned again in 1965. The FCC adhered to its prior decision, but emphasized that AT&T would not be allowed to enter the international record communications business and that Hawaii was a limited and special exception to this basic policy. *American Telephone and Tele-*

* The FCC's 1955 ruling is found in *American Telephone and Telegraph Co.*, FCC Docket No. 55-1128 (November 16, 1955).

graph Co. Tariff FCC No. 132, 38 F.C.C. 1222 (1965). The FCC incorporated in its decision an "unequivocal assurance" by AT&T that it would not use this limited exception to force its way into the international communications market. The FCC stated:

> "We noted . . . with respect to the concern expressed in the petitions that the provision by A.T.&T. of telegraph service with Hawaii may be a first step in the entry of A.T.&T. into the international record field, that we had 'the unequivocal assurance of A.T.&T. that it has no intention to enter into and, in fact, has a "desire to stay out of the international record field,"' . . . ." 38 F.C.C. at 1224.

In 1966, in *ITT World Communications Inc.,* 2 F.C.C. 2d 573 (1966), the FCC decided that the IRCs should be permitted to offer Datel between Hawaii and the United States mainland. The FCC reiterated that "normally we have not licensed AT&T to provide oversea record services," 2 F.C.C. 2d at 576, but had done so with respect to Hawaii because of special circumstances. The FCC then concluded that although AT&T could continue to offer Dataphone between the United States mainland and Hawaii, (i) that the Datel services offered by the IRCs also should be available between those points, and (ii) that equity demanded the lifting of the voice restrictions on Datel so that it would be competitive with Dataphone. The FCC said:

> "It appears to us that in the absence of a showing of a serious adverse effect on A.T.&T. and HTC [Hawaiian Telephone] which showing is notable by its very absence, equity demands that we accord the record carriers some of the benefits to be derived from these modern facilities, rather than leave A.T.&T. and HTC in a monopoly position, as they would have it. By any test, it is clear that the impact of the requested authori-

> zation upon A.T.&T. and HTC would be minimal, whereas a denial would magnify the already major disadvantages suffered by the international record carriers in their competitive efforts." 2 F.C.C. 2d at 577.

The interconnection problem, however, remained a serious handicap to the IRCs, putting them at a distinct competitive disadvantage. The FCC made note of the IRCs' unequal status.

> "ITT here merely asks the right to compete in a somewhat more equal manner with the voice carriers in providing its Datel Service, a service similar to Data-Phone, and we do not think that we should compound the advantage which the voice carriers now have by continuing a restriction on the amount of voice use the customers of the record carriers may make. Even if the ITT application were to be granted it would not be in a position of equality with A.T.&T. and HTC. This is because these two carriers have a great advantage over the record carriers in that they provide Data-Phone Service through access to the vast domestic system of A.T.&T., an advantage that the customers of the record carriers now lack." 2 F.C.C. 2d at 576.

In order to preserve the "parity" between AT&T and the IRCs, the FCC in 1972 determined that RCA Globcom should be eligible to provide voice and data services to Hawaii via satellite as well as by cable. While the FCC was reversed for failing to explain why competition between AT&T and the IRCs was in the public interest, it is nonetheless pertinent to this proceeding that the FCC there also expressly affirmed its *TAT-4 Decision* and found that "the parity which was upset by the special treatment given AT&T and HTC on the Mainland/Hawaii route" should not be upset further. *RCA Global Communications, Inc., supra,* 37 F.C.C. 2d at 1049-50. In light of the changed circumstances in the industry, the FCC questioned whether

there was any need to permit AT&T to continue to provide any type of record service between the United States mainland and Hawaii.

> "It is relevant to note that subsequent events did not substantiate AT&T's pessimistic view of the situation. Traffic grew very quickly and a second cable was laid in 1964. We now have satellite facilities providing well over 200 circuits and an application for a third cable is pending. Under these circumstances, the reason for permitting AT&T . . . to provide *any* type of record service no longer obtains." 37 F.C.C. 2d at 1048 (emphasis in original).

Until the present FCC Order, the FCC decisions noted above, reflected a consistent policy of preventing AT&T from entering the international data and alternate voice/data markets.*

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* The FCC has applied the same concern in domestic telecommunications by limiting AT&T to its traditional telephone role for fear that it could leverage its monopoly position to compete unfairly and destroy other entrants. For example, in *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems,* 21 F.C.C.2d 307 (1970), *aff'd sub nom. General Telephone Co. of Southwest* v. *United States,* 449 F.2d 846 (5th Cir. 1971), the FCC determined that the public interest would best be met by excluding the telephone companies from engaging in the sale of CATV services to the viewing public in competition with independent CATV companies, except where such services could not be made available through any other company. The FCC reasoned that entry into this new market by the telephone companies "can lead to undesirable consequences" because "the telephone company is in an effective position to preempt the market." 21 F.C.C. 2d at 324. The FCC further reasoned that "the prevention of undesirable concentration of control of communications media has always been of great concern to us" and that it was empowered to preclude the telephone companies notwithstanding the absence of "specific facts and detailed descriptions of anticompetitive practices" because of "potentially inherent anticompetitive conditions of telephone company-CATV affiliations and of the possible adverse consequences thereof to the public interest." 21 F.C.C. 2d at 328-29.

Executive and Congressional Support for the Policy Enunciated in TAT-4: Intragovernmental Committee on International Telecommunications

In 1964, a blue ribbon committee of Federal Government agencies entitled the Intragovernmental Committee on International Telecommunications was formed to study and recommend to Congress an international telecommunications policy. This Committee was co-chaired by the FCC Chairman and by the Director of the predecessor to the Office of Telecommunications Policy in the Executive Office of the President of the United States. Also represented on the Committee were the Departments of State, Defense and Justice.

On April 29, 1966, after several years of intensive study of the United States telecommunications industry, the Committee reported to Congress. *Report and Recommendations of the Intragovernmental Committee on International Telecommunications to the Senate and House Commerce Committees* (April 29, 1966). The Committee considered the precise issues which the FCC subsequently addressed in its 1972 Notice of Inquiry from which the Order under review emanates. Significantly, the Committee unanimously recommended that AT&T be excluded from the international switched AVD market for the same reasons it was excluded from the international leased line AVD market in *TAT-4*.

> "Under the present (industry) structure, it appears . . . that continued viability of the (international) record carriers requires that AT&T continue to be denied the opportunity to compete in overseas voice/data service." *Id.* at 28.

The Committee wisely predicted that the switched AVD business abroad was likely to grow as rapidly as it has domestically and warned that entry by AT&T into that market would impair the ability of the IRCs to provide similar

services as well as continue to furnish telex and other services.

> "There are indications that demand will build up in the next ten years for a short-period voice/record service, such as dataphone or datex, to overseas points. In view of the considerable number of dataphone instruments that are now in use by AT&T subscribers domestically, a general overseas service of this type by AT&T could adversely affect the demand for similar services of the record carriers, as well as for their telex and possibly their message telegraph services. . . . Although the FCC has authorized both voice and record carriers to provide this type of service between the Mainland and Hawaii, it is not as yet offered by any carrier to any other overseas points." *Id.* at 24-25.*

The Committee Report was given special attention by WUI and other IRCs in the comments which they submitted to the FCC (JA 194, 246, 396; PA 75). Nonetheless, the FCC, without explanation, simply ignored the expression of executive and legislative intent embodied in the Committee Report.

In summary, until the Order here under review, there was a basic and consistent FCC policy, reinforced by the Intragovernmental Committee Report, prohibiting AT&T from engaging in international data communications save for the narrow and necessary exceptions of Hawaii and the pre-1964 private line AVD services provided to defense agencies. The FCC has been careful not to expand those exceptions where viable alternatives existed. In the instant proceedings, however, the FCC abandoned that policy without providing any reasons for its action.

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* The Intragovernmental Committee further reasoned that although the competition among the IRCs had "in the past provided benefits," in order for the IRCs to compete effectively against the voice services of AT&T, a merger among the IRCs might be necessary. *Id.* at 31-32.

The FCC's Failure to Explain Its Holding and Its Inadequate Consideration of the Above Precedents

The FCC, as mentioned above (*supra* at pp. 8-9), offered three explanations for authorizing AT&T to enter the overseas AVD market notwithstanding *TAT-4*. None of these grounds is factually supported by the record upon which they are supposedly based. Moreover, the FCC omitted any reference to the other precedents outlined above which the FCC decided subsequent to and consistent with *TAT-4*, constituting in all a basic FCC policy formulated and adhered to over 12 years and, together with the Intragovernmental Committee Report, constituting established national policy.

First, and perhaps most important, the FCC's characterization of the switched AVD services which the IRCs proposed to provide was simply erroneous. The IRCs proposed to offer a "basic" switched AVD service, no different from AT&T's Dataphone offering. One of the IRCs, in addition, proposed an embellished service which would allow users, among other things, to communicate in one transmission to a number of receiving stations, to store messages for later transmission at off-peak hours, and to otherwise increase the convenience and flexibility of use.* According to the FCC, however, the IRCs proposals entailed *only* proposed "specialized" AVD service, while AT&T proposed to provide only the "basic" AVD service. The FCC stated:

> ". . . the record carriers propose to offer features significantly different from AT&T." (JA 4).

The FCC then made that distinction the basis for not having to follow *TAT-4*.

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* A discussion of these specialized features, which were proposed by RCA Globcom, is contained at JA 207-20.

> "... unlike the TAT-4 situation, we are faced here with different proposed services, meeting different subscriber needs ...." (JA 6).

The FCC's conclusion is invalid for it rests on an invalid premise that AT&T and the IRCs were proposing different services.

The FCC could not rationally have concluded from the record that any distinction existed in the services proposed by AT&T and the IRC. The comments filed by the IRCs clearly show that they proposed to offer all forms of AVD service, particularly what the Order referred to as "basic dataphone-type services." *

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* The following are simply some illustrations from the comments filed by the IRCs.

> "International Dataphone service or its equivalent should be provided by the international record carriers." (JA 179).
>
> * * * * *
>
> "In view of the foregoing ITT Worldom urges that the Commission answer the threshold question of whether AT&T should be permitted to provide international dataphone service in the negative. This developing service should remain and be treated as a record service which should be rendered by international record carriers only." (JA 92-93).
>
> * * * * *
>
> "It is only necessary for the Commission to modify existing international record carrier authorizations, so as to permit unrestricted voice communications combined with data and facsimile transmissions, in order to transform datel into the international data/voice demand service which is the subject of this proceeding." (JA 245).
>
> * * * * *
>
> "We submit that the public interest thus requires that the Commission assure the continued viability of the international voice/record carriers by authorizing RCA Globcom, and other qualified international voice/record carriers, and not AT&T to provide all switched overseas voice/data, data-only facsimile services." (JA 234).
>
> * * * * *

(footnote continued)

The FCC ignored these comments of the IRCs, preferring to concentrate only on the fact that one of the IRCs had proposed to offer more specialized services in addition to basic AVD services.

The FCC's distinction of *TAT-4* on the basis of "different services" being offered therefore is without merit.

The second distinction suggested by the FCC as justifying its departure from *TAT-4* is based on an assumption that the IRCs will charge more because their proposals supposedly contemplate the offer of "specialized" AVD services. Yet, at least two of the IRCs (ITT Worldcom and RCA Globcom) explicitly represented that their services would be offered at rates comparable to AT&T's present international telephone rates for voice communications,* and the other IRCs would undoubtedly have to price their offerings competitively. Whatever additional investments

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(footnote continued from preceding page)

"Accordingly, RCA Globcom strongly recommends that the Commission authorize RCA Globcom and other qualified international voice/record carriers, and not AT&T, to provide overseas switched voice/data and facsimile services. Such a result is not only to prevent an excessive concentration of control over communication facilities, but is absolutely essential to maintain the viability of the entire international voice/record carrier industry." (JA 189)

* "We recognize that present international message telephone rates are somewhat lower than existing Datel charges. We therefore assume rate reductions in connection with the provision of overseas switched voice/data service so that the rates would be approximately the same for the two services subject to any special costs incurred." (JA 231).

* * * * *

"Rates for international dataphone would be comparable to the current rates for voice transmissions." (JA 99).

* * * * *

"For the purpose of this response, . . . the rates used by ITT Worldcom for international dataphone are comparable to present rates for overseas telephone message services." (JA 123).

the IRCs contemplate for improvement and development of their more sophisticated switched AVD services would have no effect on the cost to the public of what the FCC styles "basic dataphone-type services." In fact, the FCC Order at one point recognizes that the IRCs proposed to equal AT&T's rates. It then seems to suggest, however, that the IRCs would have to be able to "undercut" AT&T's rates in order for the FCC to consider keeping AT&T out of this market. (JA 5).

Additionally, the FCC appears simply to have accepted, without investigation, the AT&T assertion that by utilizing its existing facilities it could provide basic switched AVD service without incurring any substantial added costs. The record before the FCC does not support this finding. Further, experience has shown, that quality of transmission is more critical with data than with voice and that *small* variations in the strength and order of signals will affect the quality and acceptability of data transmission. AT&T therefore will be required to improve and upgrade its existing voice-oriented facilities. The FCC apparently recognized this fact by requiring AT&T to obtain further Secton 214 authorization prior to any "substantial modifications" of its existing overseas telephone network (JA 7). This requirement, however, is impossible to police. No one will be able to distinguish between the maintenance and improvement of lines aimed at upgrading data, as opposed to voice, transmission. Therefore, no one will know when AT&T is making the "substantial modifications." Since the portion of the business that it will do in furnishing international switched AVD services will be infinitesmal in relation to its overall business, albeit most significant in relation to the business of the IRCs, AT&T will be able to "bury" significant Dataphone improvements among the vast expenditures necessary to maintain its worldwide operations.

The FCC also uncritically accepted AT&T's assertion that its proposed rates for overseas Dataphone services are "cost-justified." (JA 5). The FCC thereby lost sight of its prior decade-long investigation of AT&T's rate structures, the outcome of which was so inconclusive as to cause the Court of Appeals for the District of Columbia to comment that the FCC seemed to be " . . . losing its ability to effectively regulate at all." *Nader* v. *FCC*, 520 F. 2d 182, 207 (D.C. Cir. 1975).* The FCC also ignored the suggestion made by ITT Worldcom that before any conclusions regarding AT&T's costs are reached, the FCC should inquire into whether there was any presence here of the common unfair monopoly ploy of cross-subsidization (JA 92).

As the third justification for its departure from *TAT-4*, the FCC stated that AT&T's entry into the overseas switched AVD market was necessary to satisfy an "unmet need by giving added flexibility to the customer to use the international switched telephone system for both voice and data." (JA 6). This conclusion too rests upon the inaccurate hypothesis that the IRCs did not propose to provide the same service at the same rates at AT&T. Moreover, this conclusion disregards the fact that any "unmet need" was created by AT&T's adamant refusal, over more than a decade, to permit the IRCs to interconnect Datel with AT&T's domestic MTS network. AT&T can hardly be

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* FCC Commissioner Nicholas Johnson, dissenting from the compromise "statement of rate making principles" between the FCC and AT&T, expressed a similar view, remarking that the compromise " . . . call[s] into sharp question the capability of this agency to engage in public utility regulation at all" *American Telephone & Telegraph Co. and the Associated Bell System Companies*, 18 F.C.C. 2d 761, 776 (1969).

In a similarly endless investigation involving the pricing policies of AT&T's Western Electric affiliate, the FCC itself conceded its inability in 'developing a meaningful evidentiary record" which the investigation required. *American Telephone and Telegraph Co.*, 32 F.C.C. 2d 691, 692 (1971).

allowed to benefit by an "unmet need" which its obstinacy created.

In sum, none of the three supposed justifications for the FCC Order stands up and there is no articulation therein of the basis and purpose of its rule as required by Section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(c). While the FCC was careful to say that its decision "should in no way be construed as reversing" the policy established by *TAT-4* (JA 6), the fact is that the Order, without any sound explanation, does depart from the principles of *TAT-4*. The FCC failed rationally to explain why the public benefit in preserving the viability of the IRCs, upon which *TAT-4* was based and which the FCC in later cases reaffirmed, now should be ignored and why there should be a complete turnaround of policy regarding what AT&T should, and should not, be allowed to do.

POINT II

THE FCC FAILED TO ADEQUATELY INVESTIGATE AND CONSIDER THE POTENTIAL ANTI-COMPETITIVE EFFECT OF AT&T'S ENTRY INTO THE OVERSEAS SWITCHED AVD MARKET.

Regulatory agencies are required to implement the nation's antitrust policies as part of their statutory responsibility to represent the public interest. Key factors in any FCC determination as to whether new services should be authorized and if so, by whom, include the anti-competitive effect of the FCC determination as well as whether less anti-competitive alternatives are available. *See FMC* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 244 (1968); *City of Lafayette, Louisiana* v. *FCC,* 454 F.2d 941, 948-49 (D.C. Cir. 1971), *aff'd sub nom. Gulf States Utilities Co.* v. *FPC,* 411 U.S. 747, 760 (1973).

Because administrative agencies frequently are in the unique position of preventing an antitrust problem from arising in advance of a *fait accompli*, it has been recognized that antitrust issues should even be explored by administrative agencies *sua sponte*, when not raised for consideration by the parties.

> "Antitrust questions . . . present issues of the kind that should be explored *sua sponte* in order to discharge an agency's 'active and independent duty to guard the public interest,' and if need be, the Commission should order a hearing to ascertain whether there exist 'alternative courses, other than those suggested by the applicant.'" *Marine Space Enclosures, Inc.* v. *FMC*, 420 F.2d 577, 585 (D.C. Cir. 1969).

Accord, Martin-Trigonia v. *FRB*, 509 F.2d 363, 367 (D.C. Cir. 1975).*

The FCC recognizes this obligation. For example, in the CATV decision, discussed *supra* at p. 24 fn., the FCC declared:

> "It is not open to question that antitrust policies and the public interest standard of the Communications Act are closely related, and that we are obliged to give weight to that policy in applying the statutory standard." *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished*

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* The Senate currently is in the process of enacting another statute which will further codify the above rules. In mid-June of this year, the Senate Judiciary Committee voted a bill which would require regulatory agencies, including the FCC, to place increased weight on the competitive impact of their decisions. The bill would require agencies to explicitly show that their rulemaking actions are necessary to accomplish the agency's overriding purpose, that the benefits of the action outweigh the anticompetitive disadvantages, and that the agency's purpose cannot be accomplished through a method less harmful to competition. *S. 2028*, 94th Cong., 1st Sess. (1976). Although this bill is not yet law, it reflects a Congressional concern that agencies all too often may not be fully performing their responsibilities when it comes to evaluating the anticompetitive consequences of their decisions.

to Affiliated Community Antenna Television Systems, supra, 21 F.C.C.2d at 328.*

In the instant proceeding, the FCC failed to satisfy its obligation. The IRCs brought the issue to the attention of the FCC in much the same terms as the FCC had used in *TAT-4* and the other precedents discussed above. The IRCs contended that authorizing AT&T to provide overseas switched AVD services "not only would give AT&T an insurmountable competitive advantage but would eventually threaten the viability of their other services such as Telex and Datel" (JA 2), and that the very survival of the IRCs is dependent upon the FCC "precluding AT&T from providing international dataphone services." (JA 3). In striking departure from its previously expressed concerns, the FCC, without reason or explanation, simply stated that it was not persuaded by these contentions.

In contrast to its prior rulings recognizing the inherent anti-competitive consequence of any expansion of AT&T's vast monopoly, the FCC now ruled completely to the contrary, made the matter a question of proof, and imposed the burden of proof on the IRCs. The FCC concluded that unless the IRCs made a factual showing that they would suffer a significant decline in business upon AT&T's entry into the overseas AVD market, the FCC was not prepared to accept their argument. The fact that the ruling was made in the context of a notice-and-comment rule-making proceeding without the advantages of discovery or the right of

* In affirming, the Court of Appeals for the Fifth Circuit also noted the FCC's obligation to evaluate any new proposed service in accordance with antitrust policies.

> "Additionally, we note that not only is the Commission permitted to consider the anti-competitive potential of activities which fall within the purview of its jurisdiction, but that in some instances it is obliged to consider them." *General Telephone Co. of the Southwest* v. *United States, supra,* 449 F.2d at 858.

cross-examination at a hearing renders it that much more difficult to comprehend. The imposition of such a burden upon the IRCs, without specific notice during the 3½ years of FCC deliberations, was improper under the rule of *TAT-4*, unfair and an abuse of discretion. The FCC failed to satisfy its obligation to seriously evaluate the anti-competitive consequences of its decision.

If it wished to adopt a new procedure as well as depart from established precedent, the FCC should have, at a minimum, expressed that change of position and specifically invited the IRCs to develop the requisite proof on the nature of the economic impact which would result if AT&T were allowed to provide this new service. As this Court held in *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co., Inc.* v. *Scenic Hudson Preservation Conference*, 384 U.S. 911 (1966), an agency "must see to it that the record is complete" before it acts with finality. *See also Isbrandtsen Co. Inc.* v. *United States*, 96 F. Supp. 883, (S.D.N.Y. 1951), *aff'd sub nom. Rederi* v. *Isbrandtsen Co. Inc.*, 342 U.S. 950 (1952):

> "The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible . . . . " 96 F. Supp. at 892.

Accord, Office of Communications of United Church of Christ v. *FCC*, 425 F.2d 543, 548-49 (D.C. Cir. 1969). *See also Walter Holm & Co.* v. *Hardin*, 449 F.2d 1009 (D.C. Cir. 1971) (the parties must be afforded an opportunity to make an effective showing).

The record which the FCC developed was not complete and should have been completed before the FCC acted with finality. This additional proof, as to the anti-competitive consequences of its decision, could have been adduced in a number of ways. The FCC could have called for additional comments on points of controversy; the parties could have been afforded the opportunity to use written interrogatories to expose weaknesses in the positions of the other carriers; written and sworn testimony of experts could have been presented; oral argument by each party with an opportunity for questioning by the full Commission could have been offered; and cross-examination of key witnesses may have been provided.

For example, if asked by the FCC, one form of proof which the IRCs could have developed is expert opinion testimony from investment bankers and economists on the likely consequence to the IRCs of AT&T's entry into the overseas AVD field. Significantly, in this regard, on January 13, 1976, just a few days subsequent to the announcement of the FCC's Order, Salomon Brothers, a leading investment banking firm, issued a report on the impact to the communications industry of the Order and concluded in that report "that the IRCs long-term profitability and growth will be adversely impacted by AT&T's entry into the international data market." *

The failure of the FCC to fully consider the anti-competitive consequences of its decision and the shifting of the burden of proof on that issue to the IRCs constitutes reversible error.

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* Salomon Brothers, Stock Research Department, Communications Industry, "The Impact of International 'Dataphone' Service on the Financial Performance of the International Record Carriers" (January 13, 1976).

POINT III

IT WAS AN ABUSE OF DISCRETION FOR THE FCC AGAIN TO DEFER DECIDING THAT THE IRCS ARE ENTITLED TO INTERCONNECT WITH AT&T'S DOMESTIC MTS NETWORK.

As discussed earlier (*supra* at pp. 5-6, 10-13), the IRCs' Datel customers are hampered by lack of interconnection between the IRCs' and AT&T's domestic MTS network. Specifically, the impairment of service is due to AT&T's refusal to permit automatic switching of AVD calls through the IRCs' system. Instead of data customers being able to access the IRCs as readily and conveniently as AT&T's Long Lines' Department, they are first required to access the IRCs' Datel services by placing an ordinary telephone call. These calls are then forced to pass through a transition from two-wire subscriber line facilities to four-wire trunk facilites and back again, transitions that are not technologically required, but merely arbitrarily imposed by AT&T as a means to further its monopoly* WUI has been seeking interconnection for its overseas Datel services since June 15, 1965, without success. (JA 409-29; PA 75-102).

WUI urged in the instant proceeding that as an alternative to extending AT&T's powerful monopoly into yet another communications market, the FCC should (i) order AT&T to provide the interconnection proposed by WUI and (ii) drop the voice restriction on the existing Datel services in line with its rationale in *TAT-4* and other prece-

* It is germane here to note the pending Government and private antitrust claims against AT&T and its affiliates which place in issue AT&T's interconnection practices in other fields of communication. *United States* v. *American Telephone and Telegraph Co.*, Civil Action No. —— (D.D.C.); *Litton Systems, Inc.* v. *American Telephone and Telegraph Co.*, 76 Civ. 2512 (S.D. N.Y.).

dents. For instance, in a letter dated October 17, 1975, WUI stated:

> "Since the end of the pleading stage in this docket 2½ years ago, WUI has made repeated efforts to establish arrangements for the appropriate interconnection of its own authorized datel facilities into the domestic telephone network of the Bell System. Such carrier-to-carrier interconnection would have enabled WUI to demonstrate that existing datel service, when so interconnected, can effectively meet present and future requirements for switched international data/voice demand service. (footnote omitted). It would also have demonstrated that there is no need or justification for the Commission to authorize AT&T to provide such service and to thereby vitiate its established policy to prevent AT&T from permeating every growing communications market to the exclusion of effective competition." (JA 397; PA 76).

The FCC Order, however, simply noted WUI's difficulties in obtaining interconnection with AT&T's MTS network and indicated that the FCC still was "hopeful that appropriate agreements for interconnection can be reached," failing which it would entertain pleadings from the IRCs "regarding what facilities and interconnections, not presently provided, are necessary for their proposed services." (JA 8). As the FCC should have anticipated, AT&T and the IRCs were not able to reach any agreements on interconnection. Thus, while AT&T became free to formally apply for permission to provide overseas Dataphone, the IRCs were left with their existing Datel services, unimproved by the interconnection needed for those services to become competitive.

It is not fair for AT&T to be able to interconnect its own Long Lines Department with its domestic MTS network,

without giving the IRCs the same right of interconnection. It was arbitrary for the FCC to increase the rights of AT&T without requiring a concomitant increase of responsibilities.

In its reply to the IRCs' interconnection pleadings, AT&T further argued that the IRCs did not need interconnection because the FCC intended *only* AT&T to provide "basic" overseas switched AVD services. The FCC, as we discuss in Point IV *infra,* has not rejected this contention.

AT&T's strategy cannot be allowed to succeed indefinitely. The Order was not intended to have the meaning which AT&T wishes to attach to it; even if it did, the IRCs are nevertheless entitled to interconnection so that their Datel services will be competitive with Dataphone. Unfortunately, other than convening a meeting at which this perennial interconnection dispute was discussed once again, the FCC has taken no affirmative action.*

It is respectfully submitted that the subject of interconnection is an integral part of any final determination respecting the kinds of overseas switched AVD services which are to be provided. The subject is directly related to the promotion of competition, for without interconnection, the IRCs certainly cannot compete with AT&T. It was an abuse of discretion for the FCC to have deferred consideration of the matter. We therefore ask that even if the FCC Order is not set aside, that the FCC be stayed

* The FCC has not acted upon the most recent interconnection comments which the IRCs filed pursuant to paragraph 16 of the Order, nor has the FCC indicated any intention to deal squarely with the matter as a result of the IRCs recently raising it again in their petitions to deny AT&T's 214 application. Meanwhile, AT&T is moving closer and closer to obtaining approval of its overseas Dataphone offering while the IRCs remain stymied in their efforts to provide the public with the quality Datel services needed to meet any competition they ultimately may have to confront from AT&T.

from processing AT&T's application to provide overseas dataphone-type services until the issue of interconnection is finally resolved.

POINT IV

THE LACK OF CLARITY OF THE FCC ORDER WHICH HAS LED TO AN UNRESOLVED AMBIGUITY AS TO WHO MAY PROVIDE "BASIC DATAPHONE-TYPE SERVICES" REQUIRES THAT THE FCC ORDER BE SET ASIDE.

The FCC Order purported to express a policy as to which party or parties should be permitted to provide overseas switched AVD services. In addition to granting AT&T authority to be at least one of those parties, the FCC speculated as to which part of the market would best be served by AT&T and which by the IRCs. Seizing upon the FCC's pronouncements, AT&T contended that the Order was intended to allow *only* AT&T to provide "basic dataphone-type services," and to restrict the IRCs to offering only "specialized" services without the authority, long requested by the IRCs, to use voice alternately with data. The IRCs do not read the Order in this way. The FCC, despite its awareness of the differing interpretations of its Order, has failed to offer any clarification. The proper progress of future related proceedings cannot be achieved without a clear understanding of the FCC's intentions. The arbitrariness of the FCC's expressions, and the ambiguity as to what was intended, require that the Order be set aside.

Thus far, the FCC has permitted AT&T to proceed on the basis of its own interpretation. It is therefore necessary to assume, in these petitions for review, that the FCC Order is at least susceptible to the interpretation advocated by AT&T. We show below that such an interpretation, if in-

tended by the FCC, would be arbitrary, and in violation of the requirements that an agency must fully consider the anti-competitive consequences and must articulate a meaningful "basis and purpose" statement of its rule-making decisions. See discussion, *supra,* at pp. 15-18, 32-34.

The inevitable consequence of the Order will enable AT&T, as it interprets the Order, to monopolize the overseas switched AVD market, since the IRCs' Datel services will be less attractive to overseas telecommunications customers. Datel, if it continues to be impeded by restrictions on the use of voice, will be used only when a customer desires to send exclusively data traffic; even then, the poor quality of transmission will continue to hamper the marketability of Datel service. Dataphone, on the other hand, will also be available to transmit data *and,* in addition can transmit voice interchangeably with that data. In other words, Dataphone will be able to do everything that Datel can do and more. It will be able to accommodate teletypewriter hookups as are used for telex, photocopying machines capable of rapid and clear transmissions of facsimiles, and whatever else data technology will bring, and it will permit interspersing with the data communications whatever voice comments or explanations a subscriber wishes to add. Thus, AT&T will be able to transmit data as cheaply and conveniently as the record carriers, with the added attraction of optional voice conversation. It is readily apparent that the result of this one-sided "competition" will seriously affect the IRCs.

Dataphone is primarily a record service and, consistent with long-standing FCC policy, the IRCs alone should have been authorized to offer it. AT&T's interpretation of the Order, which contemplates exclusion of the IRCs from overseas switched AVD services, is incredible, because there is no way that Datel or any other IRC service, without inter-

connection and without voice, can compete with Dataphone. Ironically, what began as an inquiry into which carrier(s) should provide overseas switched AVD services has, if AT&T's interpretation of the Order is correct, evolved into authorization for AT&T to enter not only *that* market, but also the "pure" data market that had heretofore been exclusively and adequately served by the IRCs.

A simple illustration will help to clarify matters. At the present time international telex accounts for the largest share of the IRCs' revenues and profits. Telex service is a switched network which enables one teletypewriter machine to access another teletypewriter by means of computerized switching facilities. Once a telex connection is made, the sender types a message on his teleprinter and at almost the same time the identical message appears on the receiving unit. This is equivalent to the manner in which the recipient of a telephone transmission "hears" the spoken voice at virtually the same time the sound is uttered at the transmitting end.

AT&T at present is not authorized to offer international telex service. The service is offered by petitioners and a number of other record carriers, all in competition with one another. However, by reason of the instant Order, AT&T will be allowed to provide, incident to Dataphone, an improved and more versatile international telex service, far more attractive to customers than the overseas telex service that is now available.

Dataphone, simply put, is the connection of a data terminal to an ordinary telephone. For example, a teletypewriter (or "telex machine") can be coupled to an office telephone. Once the coupling is made, the telephone customer uses his telephone to access any compatible teletypewriter which is also connected to a telephone. Two telephone subscribers,

both having a teletypewriter connected to their telephones, then can proceed to exchange data (in this case, printed matter) via the telephone network in essentially the same way as the exchange of data takes place via the telex network. Additionally, with Dataphone, either the sending or receiving party may switch to voice communication, either to comment on the data transmitted or for any other purpose, and then if they choose, switch back to exchanging data. The Datel services offered by the IRCs, as we frequently have emphasized herein, are technologically the same as Dataphone, but, except for Hawaii, the FCC in the past has not permitted Datel subscribers the benefit of freely alternating voice communications with their data communications.

In sum, if the FCC Order is read in the way in which AT&T urges, the inevitable result will be the inability of the IRCs to compete effectively. The IRCs will not be able to develop their Datel services to compete with Dataphone because of the arbitrary restriction on voice use. Thus, under AT&T's reading of the Order, not only would the FCC be authorizing AT&T to invade the IRCs' traditional market—the overseas data market—it also would be providing the world's largest voice carrier with a "protective umbrella" as it invades that data market.

At a minimum, therefore, if, contrary to the recommendations of the Intragovernmental Committee or International Telecommunications (*supra* at pp. 25-26), the monopoly voice carrier is permitted to enter the overseas *data* business, then the competing record carriers must be given the opportunity to provide voice services in connection with their traditional record, data or facsimile communications. If the FCC intended to deny the IRCs the right to compete in the overseas "basic dataphone-type services"—a dramatic and improper curtailment of their historic and traditional

role as common carriers entitled to offer the full range of international AVD services—then the FCC had an obligation to justify such a ruling by a specific "basis and purpose" statement. There is no statement in the Order indicating such an intent. Moreover, there is no statement that one of the bases and purposes of the Order was to curtail the IRCs from being common carriers of AVD services and to relegate their roles to that of "specialized carriers." *

The lack of clarity of the FCC Order has enabled AT&T to assert an unreasonable interpretation which has frustrated the IRCs in their desire to commence providing adequate switched AVD services. The lack of clarity requires that the Order be set aside and remanded.

POINT V

THE FCC FAILED TO UTILIZE REASONABLE AND APPROPRIATE FACT-GATHERING AND FACT-FINDING PROCEDURES, RESULTING IN AN INADEQUATE RECORD AND AN ERRONEOUS DECISION.

We discussed the many deficiencies in the FCC Order in the previous sections of this brief. The deficiencies exist because of the FCC's failure to follow certain elementary principles of administrative law which, had the FCC fol-

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* The arbitrariness of AT&T's reading of the Order is also demonstrated by reference to the FCC's prior special treatment of Hawaii. As we noted earlier, while Hawaii is an "international" point for Communications Act purposes, 47 U.S.C. §222(a)(10), for unique national defense reasons, AT&T was permitted to provide non-voice communication services including Dataphone, between the United States mainland and Hawaii. Subsequently, the FCC ruled that in order not to compound AT&T's advantage over the IRCs, the voice-use restrictions on the IRC's Datel services to Hawaii should be eliminated. Therefore, since 1966, the IRCs have been eligible to provide the equivalent of what the FCC calls "basic dataphone-type services." See discussion, *supra* at pp. 21-24.

lowed them, would have resulted in a complete and adequate record, capable of supporting conclusions fairly drawn from the record, and providing this Court with the capability to make a legally sufficient review of the FCC decision.

An administrative agency has the obligation to create a record capable of withstanding close scrutiny, for the reviewing court must scrutinize the "whole record" and be "searching and careful" and "thorough probing [and] in depth" in its review of the factual basis for agency action. Administrative Procedure Act §10, 5 U.S.C. §706; *Chicago* v. *FPC,* 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972). *See also Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 415-16 (1971); *Northern California Power Agency* v. *Morton,* 396 F. Supp. 1187, 1193 (D.D.C. 1975).

An agency, such as the FCC, may employ a variety of procedures to satisfy the standards of reasoned decision-making and meaningful judicial review. It has the flexibility to tailor proceedings to fit the issues before it. For example, in *American Airlines* v. *CAB,* 359 F.2d 624, (D.C. Cir.) (*en banc*), *cert. denied,* 385 U.S. 843 (1966), the Court of Appeals commented:

> "It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience." 359 F.2d at 633.

The greater the impact of the potential decision on the public and the specific parties before the agency, the greater the need for enhanced procedures.

> "[T]he firm direction of recent decisions is that 'Procedural requirements . . . depend in part on the importance of the issues before the agency' and 'The kind of procedure required must take into account the kind

> of questions involved.'" *Appalachian Power Co.* v. *EPA*, 477 F.2d 495, 500-51 (4th Cir. 1973).

Furthermore, when specific and material issues of fact are raised, due process of law requires that some form of evidentiary hearing be held. *Bell Telephone Co.* v. *FCC*, 503 F.2d 1250, 1266-68 (3rd Cir. 1974), *cert. denied sub nom. American Telephone & Telegraph Co.* v. *FCC*, 422 U.S. 1026 (1975). *See also Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1252-53 (D.C. Cir. 1973). The requirements of a particular case may call for procedures somewhere between the notice-and-comment procedure utilized by the FCC in the instant proceedings and a full trial-type hearing.

> "The choice is not between a full trial-type hearing and no public proceeding at all. The goal is rather to insure that administrators provide a 'framework for principled decision-making'—a framework that is appropriate for the issue at hand." *O'Donnell* v. *Shaffer*, 491 F.2d 59, 62 (D.C. Cir. 1974) *quoting Environmental Defense Fund Inc.* v. *Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971)).

This position has recently been espoused by this Court in *Natural Resources Defense Council, Inc.* v. *U. S. Nuclear Regulatory Commission*, Docket No. 75-4276, Slip Op. at 3922-24 (2d Cir. May 26, 1976).

At stake in the instant proceedings was nothing less than a profound fundamental restructuring of the international telecommunications industry, an issue of paramount national and international importance. Accordingly, it is inconceivable that the FCC could have attempted to effect such a basic restructuring upon a record consisting of no more than broad, unsubstantiated and sharply contradictory contentions. No further procedures were employed by the FCC to segregate facts from assumptions and to en-

gage in meaningful analysis of important and difficult issues despite the commonplace use of such procedures in proceedings involving far less significant issues. The FCC could have readily developed a meaningful record capable of supporting conclusions fairly drawn from that record, by holding partial evidentiary hearings on specific points, hearing expert testimony, permitting cross-examination of key witnesses, allowing for written interrogatories or adopting any number of available techniques. These things were not done and the result is the inadequate record before this Court. It is impossible for this Court now to carry out its function of a thorough and probing judicial review when it is unable to discern the underpinning of the administrative decision.

All of the foregoing procedural tools have been utilized in the past. For example, in *International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615, 631 (D.C. Cir. 1973), the Court authorized the use of pre-screened written interrogatories to be asked of witnesses before a hearing board. In *Bell Telephone Co.* v. *FCC, supra,* the parties had the opportunity to make oral arguments, and more would have been required had the court found that any "genuine issue of material fact" had been raised. In such an event, the Court ruled, the FCC would have been required by due process of law to conduct oral hearings. *Id.* at 1266-68. *See also* N. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes,* 75 COLUM. L. REV. 721, 740-46 (1975).

The FCC, in the instant proceedings, made assumptions and uncritically accepted contentions in numerous material respects when it could have readily elicited the necessary facts. For example:

a) There was no basis in the record to distinguish between AT&T's Dataphone offering and the IRCs' Datel offering. Simple questions addressed to the parties requiring them to specify any material distinctions would easily have elicited the essential facts on this issue.

b) There was no basis for the FCC to find "an unmet need" that did not stem (i) from its own policies in refusing permission to the IRCs to use voice on Datel transmissions (other than for "cue and contact") or (ii) from AT&T's adamant refusal to allow interconnection. Again, a discrete interrogatory could have elicited the reason for any "unmet" need and less radical and anticompetitive means to satisfy the need.

c) There was no adequate basis for the FCC to conclude that the IRCs would suffer little impact from the FCC's decision to permit AT&T to offer Dataphone service internationally. The only support cited by the FCC for this assumption is its observation that Dataphone and other services, domestically, "have all been offered for many years and a market appears to exist for them all." (JA 7). The FCC utterly failed, however, to explore this most critical issue, either by delving itself into the many proceedings in its files that contained relevant evidence, or by causing the parties to present relevant evidence. What has been the relative growth, if any, of domestic telex in comparison with the growth of international telex? Any law office manager knows that facsimile machines coupled with telephones are more and more being used in place of telex machines to transmit record communications (memoranda) domestically. These facsimile machines, using the MTS network and having alternative voice capability (if the subscriber wishes to take advantage of that capability) have multiplied by geometric rates. Undoubtedly, the same experience

(Dataphone vs. domestic telex) exists in many other industries, raising a major question as to the accuracy of the FCC observation. Furthermore, the FCC failed to mention whether it took account of the 1971 agreement between Western Union Telegraph Co. and AT&T, by which AT&T covenanted not to permit subscribers to use teletypewriters (telex machines) for Dataphone transmissions until sometime in 1977.* The purpose of the agreement was to protect Western Union's domestic telex services from Dataphone competition. Similar protection does not exist internationally; without such protection, Dataphone undoubtedly would have had substantial impact on telex. (See, for a development of this proposition, our discussion *supra* at pp. 41-44). In sum, the FCC based a major part of its decision on an observation that was poorly thought through when it could easily have required the presentation of relevant and essential facts capable of supporting a finding that would have truly reflected existing conditions.

d) Instead of evaluating the anticompetitive effects of its decision and the presence or absence of alternatives that had less of an anti-competitive impact, the FCC authorized the extension of AT&T's monopoly which will substantially affect the ability of the IRCs to compete. The cases discussed, *supra,* at pp. 32-35 describe the obligations of the FCC which it did not fulfill to develop a record relevant to the antitrust criteria it was required to evaluate.

It is idle to go on to list more such failings in the proceedings below. Administrative procedures are, of course, intended to be flexible, and administrative agencies should not be bogged down in useless procedures. But there is little excuse when a matter is allowed to lie dormant for

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* Western Union Telegraph Co. and petitioner Western Union International, Inc. are different and unrelated companies.

3½ years after pleadings are filed, and then rushed to decision informed only by assumptions and contentions. Proper administrative procedures, if followed, would have taken advantage of the 3½ years to develop a full and complete record of issues of such pre-eminent national and international importance.

CONCLUSION

For the reasons stated, the FCC Order should be set aside and remanded.

July 30, 1976

Respectfully submitted,

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Linda F. Sutton
LINDA F. SUTTON

Sworn to before me this
30th day of July, 1976.

Kathie C. Wallace
Notary Public

KATHIE C. WALLACE
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Certificate filed in New York County
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